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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN LAVAR FRANCKS, <i>Plaintiff and Respondent,</i>	}	Case No. 10886
VS.		
RETA LAVEE M. FRANCKS <i>Defendant and Appellant,</i>		

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

The parties will be referred to as they appeared in the lower court. The symbol "OSC" will refer to the Order to Show Cause transcript for hearing October 10, 14 and 17, 1966 and "TR" will refer to the transcript of the trial held on January 18, 19 and 20, 1967.

STATEMENT OF THE KIND OF CASE

This is an action for divorce, award of custody of three minor children and a division of property.

DISPOSITION IN LOWER COURT

The Court granted a divorce to the plaintiff, awarded to him the custody of the three minor children, and made a property settlement.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the award of custody of minor children to plaintiff.

STATEMENT OF FACTS

The Plaintiff Respondent agrees with the initial statement of Facts by Appellant.

He admits that the primary testimony of the defendant's unfitness was given by himself and the parties' young son.

It is the Respondent's contention that the defendant's girl and women friends did not know what went on in the home, just as they did not know of her being out with another man in her black nightgown.

The sole issue raised in this appeal is whether the lower court's findings and decision based on the six days of hearings to the effect that defendant mother was unfit and that it was for the best interest of the minor children that their custody be awarded to their father, plaintiff-respondent, who the court found was a fit and proper person (TR 527) should be set aside.

John Michael Francks, the oldest child, of the parties, in open court and under oath selected the plaintiff as the parent to whom he wished to have his custody awarded. Selection marked Exhibit 22.

The Court found it was also for the best benefit and interest of the other two minor children, Mickey Mischelle Francks and Matthew J. Francks that their custody be awarded to Plaintiff father (TR 527).

The evidence presented a family where the father plaintiff continually acted and lived for the best interests of his wife and children and where the mother defendant lived a selfish existence for herself.

The evidence shows the character of the defendant by likening the home maintenance to her appearance. Her front rooms were immaculate (TR 13), but the family's meals were not prepared, (TR 39), dishes were not washed, husband's and children's clothing not repaired, (TR 31), cleaned or put away, the baby was not tended, the school children not helped with their lessons and the children and husband being destroyed by internal friction caused by the mother, (TR 23), by her going out at night and finally by her violating her marital vows. (TR 20, 46, 222, 256).

The defendant is a woman who was immaculate in public, but who in the confines of her home drank excessively, travelled over the city

streets at night after her husband was asleep, (TR 243), told lies about her activities (TR 251-254), and was eventually discovered by her husband up a back street of her community, dressed only in her black negligee and in the arms of another man. (TR 20, TR 450).

Appellant contends that the evidence reviewed in the light most favorable to plaintiff does not sustain a finding that the defendant is unfit and that the trial court erred in awarding the custody of the three children to plaintiff.

It is Respondent's contention that there is evidence that defendant was unfit upon which the trial court relied in making his decision. The plaintiff and son testified that meals were not properly fixed in the home. Defendant would lay in bed in the morning while the children fixed their own breakfast (TR 29). The family rarely had regular meals and the baby lived on coke and candy (OSC 288).

There is no question but that the Defendant, while under the influence of intoxicants and angry, threatened to kill both the plaintiff and the children (OSC 236, TR 23, 24, 118, 454). That the defendant recognized her need for help by voluntarily committing herself to the Utah State Mental Hospital.

The defendant had no patience with the children and without cause would punish the boy Michael until it became a major problem for him. (OSC 248).

That although the defendant was a good seamstress she didn't have time to prepare clothing. There was never ironed clothing for the family and the children's underwear was in rags. The washing would stack up in the closets, but defendant had time to travel in the afternoons visiting neighbors and gathering junk glass (over 50 bottles in the basement) for her hobbies. (OSC 287).

The baby was neglected with the defendant being too busy to train him or adequately change his diaper. The child suffered with raw sores and a galded body (TR 29).

Compared to the above evidence, the Respondent father continually cared for his children.

He fixed the children's meals, baby tended, took the children with him to church and little league ball activities. That he took interest in the children's school activities.

Vail H. Nielson testified (OSC 255) concerning the father's baby tending. Hayley Anderson testified (OSC 270) concerning father's church activities with children. They also testified of the fine home the children reside in with their father and grandparents, Mr. and Mrs.

John Francks, of Ephraim, Utah. Bishop Lawrence Poulsen testified concerning the good home (TR 180). Neighbors Linnie Findlay (TR 185), and Edna Nielson (TR 189) testified about the good home of Mr. and Mrs. John Francks and the fine reputation of these lifelong residents of the community.

In comparison every witness produced by the defendant, namely, Barbara Jensen, (TR 204), Joyce Parry (TR 340), Ila Olsen (TR 343, 348) and Hazel Jensen testified they each spent considerable time with the defendant, which Respondent contends was true. He stated the defendant was so busy socializing with these visits and her travelling she didn't have time for her own family.

The city marshal Grant Larsen, testified about defendant's night trips, and on one occasion finding her drunk sitting in the car in the garage.

The defendant's girl friend Diane Allred testified about defendant's night traveling and on two occasions seeing her car following other cars. (TR 256-258).

The children's grandmother, Mrs. John Francks, testified as to the children not being taken care of (OSC 320) prior to court's Temporary Order and the care of the children after the Order.

The Respondent did not contest the fact he had furnished a good home for the family and that his wife had initially during their marriage been a good mother.

He did, however, state her conduct had changed, that (TR 29, 30, 31), she wanted a glamorous life, was not taking care of the family, (TR 38), was using excessive intoxicants (TR 109), and was no longer properly caring for the children. (TR 93).

It was based upon all these factors that the court found that it was for the children's best interest that their custody be awarded to their father.

POINT I

DID THE TRIAL COURT ERR IN FINDING IT WAS FOR THE BEST INTEREST OF THE CHILDREN TO HAVE THEIR CUSTODY AWARDED TO THEIR FATHER?

The answer is "No." The court had an excellent opportunity of observing the parties' demeanor during nearly six days of testimony. The trial Judge stated that the father John LaVar Francks, is a man of good moral character and is a fit and proper person in all respects to have and be awarded pursuant to his sons selection, the care, custody and control of his son John Michael Francks.

The court further found that it would be for the best benefit and interest of the other two minor children to have their custody awarded to the father. (TR 527).

Our Supreme Court has continually held

“The paramount consideration in considering custody of child of divorced parents is what will serve the best interests and welfare of the child.”

In *Steiger vs. Steiger* 4 Utah^{2d} 273, 299, P.^{2d} 418 this rule was approved and the court further stated a divorced mother has no absolute right to custody of child, but all things being equal, preference should be given to mother. In the Steiger case the court found both parents were unfit, but indicated the mother would correct her past behavior.

In *Curry vs. Curry* 7 Utah^{2d} 187, 351 P.^{2d} 931 our Court stated that the Trial Court is vested with broad equitable powers in divorce matters, and its judgment will not be disturbed lightly, nor at all, unless evidence clearly preponderates against his findings, or there has been a plain abuse of discretion, or a manifest injustice or inequity is wrought, also cited *MacDonald vs. MacDonald* 120 Utah 573, 236 P.^{2d} 1066.

The evidence presented before this court in present case showed that as in most families the persons most intimately affected generally know the most about the true state of affairs. From outward appearances the mother appellant appeared to be living an exemplary life taking care of both husband and family. When she was discovered in the arms of another man, her husband refused to continue the sham of being married to a selfish, immoral woman, and the true state of affairs came out. The Respondent husband testifies as to the family affairs as he found them, a mother who failed to fix meals for the family, continually travelled and visited during the day, failed to take care of clothing of children and spouse, a wife who drank and then travelled at night when her family was in bed. The small son in making his selection before the court testified that he knew what would be for his best interest and the best interest of his brother and sister by selecting his father for custody.

Our Supreme Court held in *Smith vs. Smith* 15 Utah^{2d} 36, 386 P.^{2d} 900 that the custody of a child should be awarded to the parent selected by the child unless the parent is found to be immoral or unfit to have the custody of the child.

In our case the son made a selection to go with his father and the trial court properly followed the selection.

The trial court further found it was for the best interest of the two younger children that their custody likewise be awarded to their

father. It is probable that the court considered the following testimony in making a determination of the mother's unfitness:

Some of the testimony of her husband is as follows:

(TR 29)

Q. During the past year, during the school year early 1965 and through the summer, will you describe your wife's habits and her actions. We will start with the morning. What would happen in the morning?

A. She would lay in bed. She was very neglectful on getting up in the morning, taking care of the children, getting them ready for school. My oldest boy would always get his own breakfast, and my oldest boy would, my youngest boy would wake up quite early in the morning, he has this habit, and Michael would have to get up and take care of this boy and tend him and watch him until she got up from bed, which was many a time just before the children had to leave to go to school . . .

Q. (By Mr. Tibbs) . . . care of the baby during the year . . .

A. Through the morning the baby would run around in the house for quite some time in his wet jammies and wet diapers. It would be quite some time before she would get him dressed. She neglected him very poorly in changing the baby. The baby got very raw and very raw from diaper rash, diaper burns on his little bum. The meals for the baby was very poor and very irregular.

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A. We never had a dinner table set up at night. We never ate our dinner at the table. Lots of times she would cook dinner and we would come in and fix our own plates and go in and sit around the television . . . if she would set a dinner table, and on occasions she did. But she never set a proper table . . . And our eating habits was around the television.

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A. . . . but the children's underclothing was very poor. Their shoes were poor. She neglected in buying clothing for the children.

. . . The ironing of the children's clothing was neglected.

(TR 39)

A. There was always dirty dishes in our home. In fact even at meal time we would have to wash our own dishes. The sink was always filled with dirty dishes.

Q. Concerning garbage and clutter, will you describe this?

A. Yes. There was always quite a large amount of garbage and a lot of it just right outside the kitchen door.

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A. Our front rooms are immaculate. They are spotless. She keeps

the front rooms very nice.

Q. Now describe the kitchen during the similar period of time.

A. The kitchen is, like I said, it's always got dirty dishes in the sink and most of the time it was a clutter.

(OSC 120)

A. There was never a table prepared. We never had our tables prepared for meals. We never had certain designated times for meal times.

. . . I would come in from the farm to see that the kids got to school. And on several occasions I have come in the house and my wife would be getting up at that time, or she had got up and came down and was laying on the couch watching television. She never made any effort of preparing breakfast for the children. My oldest boy has always got his own breakfast; opened up a box of cold cereal.

(OSC 288)

Q. Concerning her drinking, will you advise the court concerning these drinking habits of her and under what circumstances occurs.

A. Yes. I, my mistake here. I was the one that was involved in buying this liquor. At the time I felt like maybe this was right, maybe I could control it. But it got to a point where it got out of hand on me. I realize now that I was entirely wrong here. There has been several occasions that she has wanted drinks or parties or most of the time that we had this drink was with our sex life. And she would approach me in this manner: Would you like a little loving tonight? And I say yes, that would be fine. Well, do you have anything? No, I don't. And then immediately everything was forgotten. Whenever I opposed her on this matter at home she became very sulky, sometimes not talking to me, oh, the rest of that night and into the day. Lots of times she would get in the car and leave and I would ask, well, where are you going? Lots of times she wouldn't answer me. She would just up and leave without no reason. I found it was easier to have a little bit of peace and contentment in the house, it was easier to give in to her wants.

Q. Is this drinking unusual or has it become a regular occasion, regular situation?

A. It has become very regular. It has come to the amount of close to a quart a week.

Q. Concerning conditions of the home, will you describe meals . . .

A. The meals in our home have been very poor. The breakfast meal, my boy he has always had to fix his own breakfast, and this consists of

cold cereal most of the time. She was generally in bed through breakfast time. . . . the lunch meal . . . the children are in school. . . . Our dinner meal in the evening mostly consists of sandwiches, hot dogs, bologna, this sort. There was never a balanced meal set on the table. Toward the tail end, before I left, she did cook steaks but this—that for our dinner. But this consists of simply a steak. She would cook a piece of meat and put on the table and this was our dinner. And she would generally cook three pieces, one for myself, one for her, and one that she would cut in two for the two children. Our meals in our home have been very poor. They haven't been balanced meals at all.

Q. . . .

A. No, there is never any routine of meals at home at all. . . .

Q. Concerning the baby, how does she care for the baby?

A. The baby, he just didn't eat at home. His diet consists of coke and coffee. And he, once in awhile would get a raw wiener out of the fridge and eat on this. But he has had absolutely no eating habits at all at home. . . .

Q. Is the baby trained?

A. No. I am in the process of training the baby now. But the baby is not trained.

Q. How old is the child?

A. He is over two years old. He talks fairly well and he will tell you when he wants to use the potty . . .

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A. Most very time I came home from work I found the baby in messy pants.

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A. Yes. My little girl has quite thick hair. Reta has no patience with her whatsoever in tending her hair. I have sat and watched her brush out this little girl's hair and comb it and that little girl has just positively cried with hurt. . . .

Q. How was Reta's attitude toward the children? I am talking specifically about patience and taking care of the children, understanding their problems, their concerns?

A. Reta had no patience with the children. With Michael, Reta didn't trust Michael. She was on Michael all the time. She just really, I should say mutilated the love with the little girl. She had no patience with the little girl. . .

(OSC 293)

A. Reta has an immaculate wardrobe. She has almost a pair of shoes for every dress she has. She has in the one end of our closet, the whole side of it, there would be twenty-five pairs or better of shoes in there. Her dresses, we have quite a large closet in our upstairs bedroom, in fact it takes the full length of the wall, this is completely filled with Reta's dresses. Downstairs in our television room we have two large closets. The one closet to the west is completely filled with Reta's blouses. They are all neatly pressed, neatly hung in there. In the other closet is Mickey's and Matthew's and myself's clothing.

Q. How does her wardrobe compare with your wardrobe or the children's wardrobe?

A. My girl has one pair of shoes. My boy has two pair, one a work pair of boots that we just got him recently and a pair of, I guess it would be kind of dress-type boots. But he bought these with his own money. . . .

A. Reta washes the clothes, yes. She has a nice washer and a nice dryer. The ironing of my cloths and of the children's clothes is very neglected. She has a large piling of ironing in the one closet. I could never go to the closet and get myself a white shirt to go. I have always had to take it and have it ironed. With Michael, Michael most of the time did have shirts, but most of the time he would have, he would go to school in a shirt that wouldn't be ironed. Mickey's dresses she did keep fairly well to a certain extent. Their underclothing was very shabby. Michael's underclothing consisted of an elastic band and just shabs a hanging down. Their underclothing was very shabby.

(OSC 294)

Q. Concerning your wife's morning habits, when does she get up in the morning? What are the habits in the home concerning her getting up?

A. Very few times that my wife has been up before my children have been up. And on many and many occasions my wife has hollered in to my boy and told him to go in and get the baby and take him downstairs. She sleeps in very late. Lots of times she gets up just shortly before it is time for the children to go to school.

(OSC 298)

Q. Where does she drive this car to?

A. Well, I guess just around town. I am not sure where. But it is just her uses in town with the car.

Q. Have you had conversations with your wife concerning her glamorous life or threatening to take the children?

A. Yes, I have. We have had this discussion quite a bit. Reta hasn't been very happy with married life. She doesn't enjoy housekeeping. She doesn't enjoying doing housekeeping. She enjoys the more glamorous things of life.

Q. Has she told you this?

A. Yes.

Q. Concerning specific conversations—

A. Yes. Reta has told me on several occasions that she didn't want to marry me, that I was the one that wanted to marry her. She has told me on several occasions that she didn't enjoy the children. If we had to take the children with I would just as soon not go. This was a common statement of hers.

The other witness who was close to the situation was the 11-year-old boy, Michael, he testified as follows:

On Baby Tending

(OSC 239)

Q. Mike, who does the baby tending around your house?

A. Me. I did it when I was old enough. When I was quite old enough and then I would do it almost all the time. Sometimes three times a day.

Q. Would you baby tend quite often?

A. Yes.

Q. Who did you tend?

A. My little brother.

Q. How old is he, Mike?

A. He is two.

Q. Did that make you mad?

A. Well, sometimes when I had to, things to do. And at first it didn't make me mad but it started getting around so often that, gee, I felt that I just had to tend him all the time.

Q. Did you complain about this to your father?

A. Yes. I complained about this to dad and mom except mom would always just turn around and yell at me when I complained about it to her.

(OSC 240)

A. Well, she said she would always go on errands, but she said she always had to go down to the store and after an hour or so I would call down to the store to see if she was down there . . .

Q. (By Mr. Tibbs) Have you called at other places trying to get her?

A. Yes, I have called down to her friends' place because after she

would go down to the store and get a few things and then she would go and pick up her friend Joyce Parry and then she would always say she took her down to the A&W and sometimes she would stay for I don't know how long. Sometimes it was more than three hours.

Q. Mike, have you ever heard the car go out late at night?

A. Yes. I have heard it. See, my window is right almost the closest one to the garage and I heard it go out many times.

Q. Is this late at night?

A. Yes, sometimes.

Q. Do you know who is in it?

A. Sometimes I don't. Usually, mostly it has been mom though because she is about the only one that ever drives the car.

As the court stated in *Deardon vs. Deardon*, 15 Utah^{2d} 105, 388 P.^{2d}, the critical question is whether the conduct shown is of such a nature as to hazard the children's welfare and make it unwise to be in the mother's custody.

The evidence in our case clearly shows that the defendant is immoral, that she was not properly taking care of the children, either as to food, clothing or loving care.

The trial court found the children's best interest was with their father.

Our Court in *Ryan vs. Ryan*, 17 Utah^{2d} 44, 404 P.^{2d} 247 stated, The husband exhibited a more genuine love for the children and they would be more likely to receive more parental love, attention and affection from him. The Court further noted that the lower court observed the parties before them, witnessed their demeanor, and could only conclude that the plaintiff was not a fit and proper person.

The Court likewise has affirmed the position that father was better for the minor child best interest in the case of *Sorensen vs. Sorensen*, 18 Utah^{2d} 102, 417 P.^{2d} 118.

CONCLUSION

After nearly six days of trial, hearing many witnesses and observing the parties, hearing the 11-year-old son select his father because it was for his best interest. We respectfully submit it is for the best interest of the children that the Trial Court decision be sustained.

Respectfully submitted,


DON V. TIBBS